BEFORE THE FEDERAL TRANSIT ADMINISTRATION

American Bus Association, Inc.,
Complainant

v.

Akron Metro Regional Transit Authority,
Respondent.

Charter Service Docket No. 2005-05
49 U.S.C. Section 5323(d)

DECISION

Summary

On April 26, 2005, the American Bus Association (the "ABA") filed a complaint with the Federal Transit Administration ("FTA") alleging that Akron Metro Regional Transportation Authority ("Akron" or "Respondent") was planning to provide charter service for the Ladies' Oriental Shrine of North America, Inc.'s National Convention (the "Convention") in violation of FTA's charter regulation, 49 Code of Federal Regulations ("C.F.R.") Part 604. On April 26, 2005, FTA transmitted the complaint to Akron and notified them that they had thirty days to conciliate the dispute. On April 29, 2005, Akron responded directly to the ABA and indicated the allegation was false.

On May 5, 2005, the ABA contacted FTA via email and indicated that it believed Akron had provided the charter service. The FTA contacted the ABA on May 31, 2005, to notify it that the conciliation period had expired and that unless FTA received a written response it would consider the matter closed. On June 1, 2005, the ABA indicated that the conciliation had been unsuccessful and requested additional time to provide an amended complaint. The request was granted.

On June 23, 2005, FTA received an amended complaint[1] along with a large box of Akron invoices allegedly proving that Akron was providing illegal charter service. FTA transmitted the complaint and amended complaint to Akron on July 1, 2005. Akron requested additional time beyond thirty days to respond. The extension was granted.

On August 31, 2005, FTA received Akron's response to the allegations. Akron continued to deny entering into a contract for the Convention. It did admit to operating as a subcontractor to private charter bus operators who requested assistance.

FTA sent the ABA Akron's response on August 31, 2005, but the ABA did not receive it until September 15, 2005. On October 17, 2005, FTA received the ABA's rebuttal to Akron's response. Akron requested leave to file a surrebuttal which FTA granted.

[1] The amended complaint was dated June 20, 2005, and received on June 23, 2005. Although titled "Second Amended Complaint," FTA does not have a "First Amended Complaint."

On October 31, 2005, FTA received Akron's surrebuttal. Akron indicated that it was engaging in permissible subcontracting, not charter service. The ABA was provided with a copy of Akron's surrebuttal and on January 4, 2006, it indicated that it did not intend to file a further response.

Upon reviewing the allegations in the complaint and amended complaint and the subsequent filings of both the Complainant and the Respondent, FTA has concluded that Akron[2] has been consistently violating the charter regulations and must immediately cease and desist from providing illegal charter service. Failure by Akron to immediately cease and desist from providing illegal charter service could result in loss of federal funds, as well as suspension of draw down privileges.

Complaint History

The ABA's first complaint against Akron was filed on April 26, 2005. It alleged the following:

1. Akron intended to provide shuttle service for the Convention in violation of the charter regulations;
2. Akron never conducted the required willing and able determination process;
3. Akron submitted a quote for the Convention service to the Akron-Summit Convention and Visitors Bureau (the "Bureau");
4. Akron has in the past provided illegal charter service for the annual Father's Day Car Show, annual golf events and other conventions; and
5. Akron is providing illegal charter service for several fraternities and sororities on the University of Akron campus.

Attached to the ABA's complaint were two recent FTA charter decisions.

On April 26, 2005, FTA provided the parties with thirty days to conciliate the complaint. Akron responded on April 29, 2005, stating that the allegation was false and Akron did not have a contract with the Bureau nor did it make a proposal for the Convention service.

In an email to FTA dated May 5, 2005, the ABA stated that one of its members had been notified by the Bureau that they "did go with Metro [Akron]—they were cheaper and were able to accommodate us..." The ABA also stated that Akron had indicated that while it had no contract with the Bureau for the Convention service, it "might have" been approached by Vance Charters, Inc. of North Canton, OH ("Vance") to provide buses for the service. The ABA was concerned that Akron would be a subcontractor for Vance. The ABA claimed that since 1998, Akron has had an arrangement with Vance, whereby Akron provided charter service and Vance received an "administration fee." Additionally, the ABA alleged that Vance is not registered with either the Federal Motor Carrier Safety Administration or the Public Utilities Commission of Ohio and may not even own a single bus. The ABA also stated that if Akron was providing the service for the Convention, it was not incidental since the service would be during peak hours.

On May 31, 2005, FTA notified the ABA (with a carbon copy to Akron) that the conciliation period had expired and that unless FTA was informed in writing that conciliation had failed and the parties intended to proceed, FTA would consider the matter closed. In response on June 1,

[2] Akron is a recipient of both Section 5307 and 5309 funds; therefore, it is required to comply with the charter regulations.

2005, the ABA indicated via email that conciliation had been unsuccessful. It went on to state that Akron may not have provided the Convention service so the original complaint may have been moot. However, the ABA had evidence that Akron had engaged in an extensive pattern and practice of violating the charter regulations and the ABA wanted to file an amended complaint.

On June 20, 2005, the ABA filed its "second" amended complaint[3]. Accompanying the amended complaint was a box containing Akron "Charterbus Order" forms from 2002-May 2005.[4] According to the amended complaint, Akron conducted approximately 469 illegal charters during the relevant timeframe. The total revenue was approximately $415,325.16. The "Charterbus Orders" were almost all for Vance Charters.[5]

In its second amended complaint, the ABA provided information regarding Akron providing service for the Ladies Oriental Shrine Convention. In response to these allegations, according to the complaint Akron indicated it was providing buses to Vance Charters, Inc. ("Vance"). The ABA submitted an information request to Akron asking for documents related to Vance. In response, the ABA received the invoices and documents attached to their second amended complaint.

Each "Charterbus Order" form lists the entity (and its contact information) requesting the service and also lists Vance. The form describes trip movement (i.e., routes, directions, special instructions), date and time of pick-up, and type of bus used. The reverse side of the form contains driver's notes from the trip indicating hours, miles, and the driver's signature. According to the records, in 2002, Akron completed 186 charters with Vance listed on the order form; in 2003, there were 138; in 2004, there were 115; and in 2005, there were 30. The ABA alleges that this arrangement with Vance had been ongoing since 1992.[6]

The ABA alleges that the trips were initiated by Mr. Burkett (the owner of Vance) sending an email to Akron, although there are also occasions when the charter organization contacted Akron directly. The complaint states that Vance was paid "an administration fee" for the service, but there is no evidence that Vance had any intention of providing the service itself. The ABA also alleges that the service did not constitute incidental service since it took place every day of the week and at all times of the day, including weekdays during peak hours. As of the amended complaint, the ABA alleged, the service was ongoing and Akron had advertisements on its buses stating, "Think Of It As A Limo With 47 Seats." The ABA requested that the FTA withhold funds or order a reimbursement of federal funds.

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[3] As previously noted, there was no "First Amended Complaint."

[4] The ABA obtained the Akron documents through an Ohio Public Records Request.

[5] The totals are approximations due to the sheer volume of invoices. The ABA numbers of charters and total revenue is slightly different than FTA's *numbers*.

[6] Attachment G to the second amended complaint is a letter from Akron to the Kiwanis International dated July 1, 1998, which *summarizes* a proposed charter trip and includes a statement that a "one-time $10 administration fee will be added onto the total by Vance Charters." Attachment H is a letter from Stan Hywet Hall and Gardens dated August 2, 2003, addressed to Bernie Burkett at Vance stating that they will need "your maximum capacity (40-47) passenger Metro buses" and requesting specific Akron drivers. The attached Stan Hywet purchase order is addressed to Akron.

On August 31, 2005, FTA received Akron's response to the second amended complaint. Akron stated it has not pursued charter business, but it has operated as a subcontractor to private operators who have requested assistance. Akron indicated it has subcontracted for Vance, Akron Charters, Thomas Limousine, Classic Limousine, and Davis Tours. Akron contends that the charter regulations do not prohibit subcontracting.[7] Akron claims that it is providing subcontracting service, which is incidental in nature, upon occasion when a private provider cannot provide the service "usually because the request exceeds their [the private provider's] capacity." Akron response at pg. 6. Akron acknowledges receiving direct correspondence from community organizations, but claims it has no direct contact with third parties. If the private operator cannot accommodate the charter work, it informs Akron of its inability to handle the requested capacity and then Akron "may have contact" with the requester to "work out the logistical details." *Id.* at pg. 7. Akron distinguishes the facts of this case from a recent Toledo Area Regional Transportation Authority (TARTA)[8] decision which the complainant cited in its second amended complaint, stating that unlike TARTA, Akron has never been cited for charter violations and has not had any charter violation findings in its last three Triennial Reviews. Attached to Akron's reply brief are copies of its Triennial Review (TR) findings from 1997, 2000, and 2003.[9] The TR finding from 1997 stated that Akron "subcontracts buses to private operators to satisfy a capacity or accessible equipment need. Charter services do not interfere with mass transportation services..." Akron Reply at pg. 10 quoting from FTA 1997 TR. The other two TRs from 2000 and 2003 stated that Akron was in compliance with FTA's requirements for charter bus.

Akron contends that the *TARTA* decision goes further than the charter rules provide for and that it should not be binding on Akron without a formal notice and comment period since it is an interpretive decision. The *TARTA* decision, according to Akron, requires Grantees to conduct a greater inquiry and responsibility to verify a lack of capacity representation by a private provider.

Akron states that the "subcontracting" it is providing is incidental service since it represents only .04% and .03% of its operating budget from 2003 and 2004, respectively. Akron also states that there has not been a complaint that the "subcontracting" service interferes with its regular services or shortened the life of the equipment used. Further, Akron states, it is providing "subcontracting" service for charitable and community organizations which allows these groups to obtain reasonably priced transportation. Without Akron's service these organizations would be "left vulnerable to gouging by private operators, who would have them at their mercy and could charge whatever price they wanted." Akron Reply at pg. 14. Attached to Akron's Reply are copies of correspondence from private operators asking to be included on Akron's "bidder's list." Attachment A to Akron Reply Brief.

[7] Akron contends that the ABA lacks standing to bring a complaint; however, the ABA is specifically identified in the charter regulations to receive notice for proposed determinations of willing and able charter operators, 49 CFR Section 604.11(b)(3), and "any interested party," under 49 CFR Section 604.15(a) can file a charter complaint. Therefore, the ABA clearly has standing to bring a complaint.

[8] The ABA relies on a number of recent FTA charter decisions including *September Winds Motor Coach, Inc., et al. v. Toledo Area Regional Transit Authority*, Complaints No. 2004-16 and 2004-18 (Feb. 24, 2005), hereinafter referred to as the "*TARTA* decision."

[9] Attachment B to Akron's Reply Brief.

On October 17, 2005, FTA received the ABA's rebuttal to Akron's response brief. The ABA states that Akron failed to dispute that it provided service for Vance on 475 occasions in three years. The ABA further contends that Vance was incorporated in 1992 by Bernard Burkett, operated under a number of fictious names, had no operating authority and did not own any buses of its own. Also, the ABA states that Akron did not dispute that under the arrangement with Vance, Vance received a $10 "administration fee" per charter trip.

The ABA states that it has learned that Mr. Burkett is the president of the local Transport Workers Union representing Akron drivers, so the arrangement with Vance is not an "arms-length" transaction.[10] The ABA points out that Akron provides no evidence that any of the private operators lacked capacity and only two of Akron's attachments from the private providers mention that they would qualify as "willing and able" providers.[11]

In its rebuttal the ABA contends that Akron failed to provide any evidence supporting its contention that the "subcontracting" service was provided pursuant to the "lack of capacity" exception under 49 CFR Section 604.9(b)(2)(i). Rather, the ABA contends that Vance routinely requested on hundreds of occasions that Akron provide charter service either via email or the telephone in exchange for an "administrative fee." The ABA requests an evidentiary hearing pursuant to 49 CFR Section 604.15(g) so that the relationship between Mr. Burkett and Akron can be fully explored. The ABA claims that the Vance-Akron arrangement was "a way to intentionally circumvent the charter service rules..." ABA Rebuttal at pg. 6.

The ABA goes on to argue that FTA has long held that "subcontracting" arrangements violate the charter regulations. It relies on *B&T Fuller Double Decker Bus Co. v. VIA Metropolitan Transit Authority*, TX-02/88-01 (Nov. 14, 1988), for the proposition that sham arrangements that are intended to circumvent the charter rules by steering business through a broker violate the charter regulations. The basis for the charter regulations is to protect private operators from being forced to unfairly compete with UMTA[12] funded recipients.

The ABA argues that the *TARTA* decision and the *Allerton Charter Coach, Inc. v. Champaign-Urbana Mass Transit District* (CUMTD), No. 2004-10 (Feb. 8, 2005) (hereinafter, the "*Allerton* decision") both support FTA's interpretation that when it refers to private charter operators leasing vehicles based on the capacity exception, it means operators who own at least one bus or van which it is licensed to operate as a charter provider. CUMTD had provided charter service on behalf of one provider for a number of years for a 10% fee. The Region found that CUMTD had violated the charter regulations. The ABA contends that Akron could not comply with the charter regulations by "subcontracting" with Vance if Vance had one vehicle, so long as there was at least one "willing and able" private provider willing to provide the charter service.

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[10] Attached to the ABA Rebuttal is a newspaper article dated August 12, 2005 from the *Akron Beacon Journal* confirming Mr. Burkett's status as union president. Attachment A to ABA Rebuttal. Akron lists in TEAM, FTA's electronic grant system, under its contact information, Bernie Burkett for the Transport Workers Union, Local 1.

[11] Attached to Akron's response at Attachment A are eight letters from private providers. Included is a letter from Davis Tours dated July 19, 1988, stating that it is a willing and able provider and a letter from J&J Tours dated September 2, 2003, stating it has its own equipment for use during service. The letter from Vance does not mention its possible status as a "willing and able" private provider.

[12] The decision referred to UMTA funded recipients. UMTA, the Urban Mass Transportation Administration, was the precursor to FTA.

In its Rebuttal Brief, the ABA states that Akron's assertion there was a lack of due process regarding the *TARTA* decision issue is a misunderstanding of the ABA's contention. The ABA cites the *TARTA* decision for the proposition that FTA has sanctioned transit agencies when the transit agencies were involved in sham transactions with the intent to circumvent the charter regulations. The ABA states that agencies have long been given deference by the courts for interpreting its own rules and that FTA in its recent decisions, both the *TARTA* and *Allerton* decisions, have ruled that the transactions were shams even when the private provider had at least one vehicle.

The ABA contends that the TR findings might have been different had the reviewers had all the facts. Specifically, had the TR reviewers known Vance had no buses or operating authority; wouldn't qualify under the "lack of capacity" exception; that Vance was run by an individual with strong ties to Akron; that Vance routinely requested buses without demonstrating lack of capacity; and that Vance was paid "an administrative fee" for the "subcontracting" service, then the TR findings would have been different.

In its Rebuttal, the ABA contends the service provided was not incidental and that Akron does not address the definition of "incidental" service in its brief. The ABA states that Akron's contention that the charter service benefits charitable and community organizations is irrelevant, since unless one of the specific exceptions under the charter regulations is invoked, Akron cannot provide the service based on the fact the organization may benefit from the service. Finally, the ABA contends that pursuant to the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users ("SAFETEA-LU"), FTA has authority to order a full or partial withholding of funds for a pattern of violations.

On October 31, 2005, FTA received Akron's surrebuttal. Akron's surrebuttal does not provide any new evidence, but reiterates its contentions that "subcontracting" service is allowed; unlike TARTA, this is Akron's first charter complaint; the three recent FTA TRs did not find charter violations; the charter service provided was incidental; and that Akron provided the charter service under 49 CFR Sections 604.9(b)(i) and (ii).

On January 4, 2006, the ABA indicated that it did not intend to respond to Akron's surrebuttal.

Acceptable Charter Service

If a recipient of federal funds, like Akron, wishes to provide charter service, then it must comply with the charter regulations. Charter service is defined as the following:

> transportation using buses or vans, or facilities funded under the Acts of a group of persons who pursuant to a common purpose, under a single contract, at a fixed charge . . . for the vehicle or service, have acquired the exclusive use of the vehicle or service in order to travel together under an itinerary either specified in advance or modified after leaving the place of origin. This definition includes the incidental use of FTA funded equipment for the exclusive transportation of school students, personnel, and equipment. 49 C.F.R. § 604.5(e).

The regulation goes on to discuss under what circumstances a Recipient may provide charter service. It states the following:

> If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service . . . To the extent that there is at least one such operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions in Section 604.9(b) applies, 49 C.F.R. Section 604.9(a).

There are a number of exceptions listed for providing charter service. The two principal exceptions involve leasing vehicles and equipment to private providers based on the capacity and accessibility restraints of the private providers. Section 604.9(b)(2). However, the threshold question to be addressed before a recipient provides any charter service is whether there are any willing and able private providers.

The ABA alleges that Akron has been providing charter service in violation of the regulations by providing "subcontracting" service to Vance when none of the charter exceptions apply. FTA agrees and orders Akron to immediately cease and desist from providing illegal charter service.

Discussion

Federal funds are provided to transit agencies to allow them to provide mass transportation. The charter regulations were meant to carve out limited exceptions that allow recipients of federal funds to provide charter service under very limited circumstances. The intent of the regulations was to prevent transit agencies from unfairly competing with private charter operators. Akron acknowledges in its own response brief that that is exactly what it has been doing at least since 2002.[13] Akron states with regard to providing the "subcontracting" service for charitable and community organizations that if Akron were prevented from providing the "subcontracting service," then "They [organizations] would be left vulnerable to gouging by private operators, who would have them at their mercy and could charge whatever price they wanted." Akron Reply at pg. 14. This statement indicates a fundamental misunderstanding of the intent of the charter regulations.

A. Charter Service

On approximately 475 occasions, between 2002-May 2005, Akron used its buses to provide service for a variety of organizations. The service was pursuant to a contract for a common purpose at a fixed price. Akron drivers drove these passengers from Point A to Point B. It is does not appear to be in dispute that Akron was providing charter service. Of the 475 occasions approximately 469 of the occasions involved Vance. Total revenue for the Vance trips is approximately $415,325.16. The question is what role did Vance have in the process.

[13] The ABA implies that this type of illegal activity has been going on for a lot longer, but it only provided information beginning in 2002.

B. Willing and Able Notice

FTA is limited in its review to the administrative record. Therefore, it is limited to the information provided by the parties. The regulations state the following:

> If a recipient desires to provide any charter service using FTA equipment or facilities the recipient must first determine if there are any private charter operators willing and able to provide the charter service . . . To the extent that there is at least one such private operator, the recipient is prohibited from providing charter service with FTA funded equipment or facilities unless one or more of the exceptions in Section 604.9(b) applies, 49 C.F.R. Section 604.9(a).

The regulations clearly state that before a recipient provides charter service it must determine if there is any willing and able charter operator. 49 C.F.R. § 604.9(a). In order to determine if there is at least one private charter operator willing and able to provide the service, the recipient must complete a public participation process. 49 C.F.R. § 604.11(a). Akron did not provide any information regarding its annual "willing and able notice." Therefore, FTA must find that Akron did not follow the "willing and able" determination process.

B. Exceptions

Under the regulations, a recipient is prohibited from providing charter service to the extent that there is at least one "willing and able" private provider, unless one or more of the exceptions in Section 604.9 applies. 49 CFR Section 604.9(b) Two exceptions are:

(1) A recipient may provide any and all charter service with FTA funded equipment and facilities to the extent that there are no willing and able private charter operators.

(2) A recipient may enter into a contract with a private charter operator to provide charter equipment to or service for the private charter operator if:

   i. The private charter operator is requested to provide charter service that exceeds its capacity; or

   ii. The private charter operator is unable to provide equipment accessible to elderly and handicapped persons itself. 49 CFR Section 604.9(b)

Akron contends that it was providing "subcontracting" charter service to Vance based on Vance's capacity limitations. Akron provided no evidence to support this assertion. FTA has undisputed information from the ABA that Vance had no vehicles and had a less-than-arms length relationship with Akron. FTA has Akron "Charterbus Order" forms that list organization contact names and phone numbers with all the driver information on the reverse side of the forms. Although Vance is also listed on the form, there is no information regarding a capacity constraint by Vance. For some of the charters there is also Vance letterhead with directions and/or contact

information, but it is the type of information a charter broker might include on its trip sheets. There is no evidence that the buses ever drove to Vance's operational location.[16]

As an aside, some of the charter trips provided involved the transportation of school children. Providing school bus service is also a prohibited activity under 49 CFR Part 605.

C. Incidental Requirement

Any charter service that a recipient provides must be incidental (49 CFR Section 604.9(e)) The definition of "incidental charter service" is charter service that does not "interfere with or detract from the provision of the mass transportation service for which the equipment or facilities were funded under the Acts; or does not shorten the mass transportation life of the equipment or facilities." 49 CFR Section 604.5(i).

Providing charter service approximately 475 times between 2002 and May 2005 constitutes providing charter service on a regular basis. It also is no longer incidental service when it is that frequent. Incidental charter service is determined on a trip-by-trip basis and generally means non-peak hours and weekends. Many of the trips provided were during the week[22] and during peak hours. Four hundred and seventy-five trips in three and a half years certainly constitute a pattern of violation, and FTA has no rebuttal evidence from the Respondent. Therefore, the service as previously explained constitutes impermissible charter since it would not qualify as incidental service.[23]

D. Triennial Review Findings

Although FTA's three most recent Akron TRs did not find charter violations, it does not prevent FTA from finding that Akron is currently violating the charter regulations. The finding in 1997 indicated that Akron was "subcontracting" buses to private operators who lacked capacity or accessible vehicles. This description meets the definition of acceptable charter service under 49 CFR Section 604.9(b). As to the findings in 2000 and 2003, it is unclear what information was provided to the reviewers. As the ABA correctly points out, if the reviewers had been provided with all the facts, the findings would have been completely different. The evidence in this

[16] In fact, the phone number listed for Vance has been disconnected and the address for Vance appears to be a residence.

[22] Of the charter trips provided in 2005, almost ¾ of the trips were on a weekday and many of them were provided during peak times.

[23] In order to be incidental, a recipient also must recover at least its fully allocated costs. FTA has no evidence whether or not Akron recovered its fully allocated costs.

complaint begins in 2002, so what the reviewers were told in 2000 is irrelevant. However, regarding the 2003 TR, presumably the reviewers were not told in detail about the ongoing relationship between Vance and Akron. If they had been told, FTA would have found Akron in violation of the charter regulations.

E. Subcontracting

Akron contends that the charter regulations do not specifically prohibit them from being a "subcontractor" to a private provider. Although that may be true, the regulations and FTA's interpretation do prohibit Akron from conducting charter operations in the manner it was doing. As the ABA pointed out, the FTA in *B&T Fuller Double Decker Bus Co. v. VIA Metropolitan Transit Authority*, TX-02/88-01 (Nov. 14, 1988), found a similar arrangement by a public transit agency to be a violation of the charter regulations. The FTA stated, "[FTA] will view any attempt on the part of a recipient to establish an exclusive brokering or subcontracting relationship as a contravention of the [charter] regulation." *Id.* at pg. 13. Whether Vance was acting as a broker or Akron was a "subcontractor" to Vance,[24] the two had an exclusive relationship. Of the 475 invoices that FTA received from the ABA, approximately 469 involved Vance, so the two parties clearly had an exclusive arrangement. Akron provided no evidence whatsoever that Vance intended to provide the charter service with its own vehicles.

This decision is consistent with both the *TARTA* and the *Allerton* decisions. In both cases, FTA found that there were sham transactions. As the FTA stated in the *Allerton* decision, "A transit agency can enter into a contract with a private provider to provide equipment or service if the private provider does not have enough accessible vehicles or does not have enough capacity. Section 604.9(b)(2) However, this exception is not for providing direct charter service, but for leasing vehicles or service to a private provider, so the private provider can provide the service." *Allerton* at pgs. 6-7. Akron did not lease buses to Vance, it provided the service. Additionally, there is no evidence that Vance lacked capacity and there is no evidence that Vance had any vehicles at all.

Akron billed customers approximately $415,325.16 for Vance related trips. FTA did not provide federal assistance to Vance so it could compete with private charter providers. Given the frequency of the number of charters, as well as the times of day and days of the week that the service was provided, it may be that Akron has an excess of vehicles and FTA will need to re-examine its spare ratio.

F. Request for a Hearing

The ABA has requested a hearing under 49 CFR Section 604.15(f) to further examine the relationship between Mr. Burkett and Akron. FTA does not believe that it is necessary for FTA to conduct a further examination of that arrangement; however, it will be providing a copy of this decision to the U.S. Department of Transportation's Office of Inspector General (OIG). The OIG may be interested in pursuing that relationship further.

[24] Vance indicated in response to an inquiry from FTA that it continued to provide charter service when it only had a sedan, no buses or vans.

Conclusion

Because Akron chose not to rebut any of the ABA's allegations with evidence, FTA finds that all the approximately 475 trips provided by Akron between 2002 and mid-2005 constituted impermissible charter service. The large number of illegal charter trips provided in three and a half years qualifies as a pattern and practice of continuing violations. Because there is no evidence that Akron even attempted to determine whether there were willing and able private providers interested in providing the service and because there is no evidence that the service qualified for one of the limited exceptions, FTA finds that Akron's activities were a circumvention of the charter regulations.

Remedy

Complainant has requested that Respondent immediately cease and desist its charter operations. FTA finds that Respondent has been providing impermissible charter service and orders it to immediately cease and desist any such further service. Refusal to cease and desist in the provision of this service could lead to additional penalties on the part of FTA. Additionally, the mileage for improper charter use cannot accrue towards the useful life of the Federally funded vehicles. Once Respondent has properly completed the willing and able determination process, if it wishes to resume providing direct or indirect charter service, then it must first obtain FTA concurrence from the Regional Office.

In its second amended complaint and its surrebuttal, the ABA requested that FTA order a full or partial withholding of funds. As the ABA points out in its surrebuttal, FTA has the authority to order such a remedy under SAFETEA-LU.[25] SAFETEA-LU provides that the Secretary of Transportation shall bar a recipient from receiving Federal transit assistance in an amount the Secretary considers appropriate if there is a pattern of charter violations. 49 U.S.C. Section 5323(d)(2) FTA finds that there has been a pattern of violations and therefore, bars Akron from receiving $622,500.[26]

In addition, pursuant to Section 11 of the Master Agreement (MA-12) (October 1, 2005), FTA could require Akron to refund grant funds for breaches of federal law. FTA has the authority to withhold from Akron the amount contemplated hereby for a violation of Federal law that constitutes a breach of the Master Agreement, which is a contract between FTA and its Grantees. Section 2(c) of the Master Agreement is the provision whereby the Grantee agrees to comply with all federal laws and regulations, including the charter regulations, which pertain to receiving

[25] However, since SAFETEA-LU was enacted and has a specific provision regarding charter penalties, FTA is utilizing its application in this case. Section 2(c) of the Master Agreement states with regard to what laws apply: "In particular, new Federal laws, regulations, and directives may become effective after the date on which the Recipient executes the Grant Agreement or Cooperative Agreement for the Project, and might apply to that Grant Agreement or Cooperative Agreement. The Recipient agrees that the most recent of such Federal laws, regulations, and directives will govern the administration of the Project at any particular time, except to the extent that FTA determines otherwise in writing."

[26] Six hundred and twenty-two thousand, five hundred dollars represents one and a half times the revenue Akron received as a result of providing illegal charter service.

federal funds. The Master Agreement, Section 11, provides in pertinent part:

> Upon written notice, the Recipient agrees that the Federal Government may suspend or terminate all or any part of the Federal assistance to be provided if the Recipient has violated the terms of the Grant Agreement or Cooperative Agreement for the Project including this Master Agreement, or if the Federal Government determines that the purposes of the laws authorizing the Project would not be adequately served by the continuation of Federal assistance for the Project.

Since Akron breached the Master Agreement by violating the charter regulations, FTA has the contractual right to suspend or terminate all or any part of the federal funds pursuant to the remedies set forth in the Master Agreement.

In accordance with 49 C.F.R. § 604.19, the losing party may appeal this decision within ten days of receipt of the decision. The appeal should be sent to Sandra Bushue, Deputy Administrator, FTA, 400 Seventh Street, S.W., Room 9328, Washington, D.C. 20590.

Marisol Simon
Regional Administrator

3-22-2006
Date

Nancy-Ellen Zusman
Regional Counsel

3/22/06
Date